Supreme Court, U.S.
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No. 01-889

In The

Supreme Court of the United States

PATRICIA S. CRAVEN,

Petitioner,

v.

UNIVERSITY OF COLORADO HOSPITAL AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an appellate court may affirm the judgment of a district court on any grounds that are supported in the record when the litigants have had a fair opportunity to develop the record?

I. STATEMENT OF THE CASE

Petitioner Patricia Craven (hereinafter "Craven") filed the subject action against Respondent University of Colorado Hospital Authority (hereinafter "University Hospital") asserting a claim for breach of implied contract, a claim for promissory estoppel, a 42 U.S.C. § 1983 claim for violation of her First Amendment rights, and a claim for wrongful discharge in violation of public policy. The claim for wrongful discharge in violation of public policy was dismissed upon summary judgment. The remaining claims proceeded to trial. At trial, University Hospital argued that Craven had been properly terminated for a number of performance problems, including, in particular, her difficulties in effectively interacting with co-employees [App. B to Petition for Writ of Certiorari at 18a-19a].

On May 17, 1999, the jury returned a verdict in favor of University Hospital and against Craven on her breach of implied contract and First Amendment claims. The trial judge then entered judgment in favor of University Hospital with respect to the promissory estoppel claim.

Subsequently, Craven appealed the First Amendment claim and the pendent state tort claim for wrongful discharge in violation of public policy to the Tenth Circuit Court of Appeals. Craven did not appeal either the breach of implied contract claim or the promissory estoppel claim to the Tenth Circuit Court of Appeals. The Tenth Circuit Court of Appeals affirmed the trial court results with respect to both the First Amendment claim and the claim for wrongful discharge in violation of public policy.

However, rather than addressing the alleged errors in the jury instruction on the First Amendment claim, which was the focus of Craven's appeal, the Tenth Circuit Court of Appeals affirmed the trial court on another basis. Specifically, the Tenth Circuit Court of Appeals held that Craven's First Amendment claim never should have been submitted to the jury as some of the items of speech at issue did not involve matters of public concern and because Dr. Craven's interests with respect to the remaining items did not outweigh the interests of University Hospital (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)) [App. B to Petition for Writ of Certiorari at 15a-23a]. Craven then filed a Petition for Rehearing, which was denied by the Tenth Circuit of Appeals. This Petition for Writ of Certiorari followed seeking a review with respect to Craven's First Amendment claim. Craven is not pursuing an appeal of the pendent state tort claim for wrongful discharge in violation of public policy.

II. REASONS TO DENY WRIT

SUP. CT. R. 10 sets forth the standards for granting a writ of certiorari, which is a matter of judicial discretion and which may only be granted for compelling reasons. Craven has failed to identify any compelling reasons why the writ of certiorari should be granted in this case. Craven contends in her Petition for Writ of Certiorari that this Court should grant the writ of certiorari because the Tenth Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings, thereby justifying an exercise of this Court's supervisory power.

However, the prevailing case law establishes that the Tenth Circuit Court of Appeals did not depart from the usual course of judicial proceedings; and thus, this Court's supervision is not required. Furthermore, Craven has failed to articulate any other compelling reasons why her Petition for Writ of Certiorari should be granted.

Specifically, in her Petition for Writ of Certiorari, Craven challenges the Tenth Circuit Court of Appeals' finding that the First Amendment claim should not have been submitted to the jury by the trial court because University Hospital did not raise that argument on appeal. Thus, Craven suggests that University Hospital waived this argument.

However, Craven's argument ignores the fact that University Hospital, throughout the course of the litigation, contested the protected status of the speech at issue. [App. B to Petition for Writ of Certiorari at 15a, n.7.] Moreover, since University Hospital was successful in its efforts to prevail at trial due to the favorable jury verdict and the trial judge's favorable ruling on the promissory estoppel claim, there was no reason for University Hospital to cross-appeal the trial court's decision to submit Craven's First Amendment claim to the jury.

There is case law addressing this very issue in the Tenth Circuit. In *Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995), the Court noted, "While the appellant challenges the district court's ruling, the appellee is only interested in maintaining the status quo, *i.e.*, an affirmance. Because the appellant comes to the court of appeals as the challenger, he bears the burden of demonstrating the alleged error and the precise relief sought. *Id.*

Appellees bear no such burden. *Id.* The *Hernandez* Court went on to hold that the distinction between appellant's and appellees' obligations under Rule 28 grows out of the court of appeals' freedom to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied on by the district court." *Id.* This broad power to affirm extends beyond the counter-arguments raised by the appellee; it includes any ground for which there is record to support conclusions of law. *Id.*

A court of appeals may affirm on any ground adequately presented to the district court, as is the case herein where University Hospital, during the course of trial, continually challenged the protected status of Craven's speech. *See, Griffith v. Colorado, Div. of Youth Serv.*, 17 F.3d 1323, 1328 (10th Cir. 1994). Additionally, an appellate court may affirm the judgment of a district court on any grounds that find support in the record, provided the litigants have had a fair opportunity to develop the record, as was the case herein. *Seibert v. Oklahoma*, 867 F.2d 591, 597 (10th Cir. 1989) (citing *Blum v. Bacon*, 457 U.S. 132, 137, n.5, 102 S.Ct. 2355, 2359 n.5, 72 L.Ed.2d 728 (1982)). An appellate court is also not constrained by a trial court's conclusions, but may affirm the district court on any legal grounds supported by the record. *State Ins. Fund v. Ace Transp., Inc.*, 195 F.3d 561, 564 (10th Cir. 1999).

In summary, the usual course of judicial proceedings allows a court of appeals to affirm a trial court on any grounds supported in the record, whether or not those grounds were raised by an appellee on appeal. Significantly, Craven has cited no legal authority in her Petition for Writ of Certiorari which stands for the proposition

that it is inappropriate for a court of appeals to affirm a trial court on bases than those raised by the litigants.

Accordingly, Craven has failed to establish a departure from the usual course of judicial proceedings and legal precedent. For this reason, there is no basis for this Court to exercise supervisory power over the Tenth Circuit Court of Appeals under the circumstances presented in this case. Therefore, this Court should deny Craven's Petition for Writ of Certiorari.

Respectfully submitted,

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